IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR

THE NINTH CIRCUIT

MRS. GLENN D. HART and GLENN D. HART, Appellants,

vs.

WALTER ADAIR, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, Appellees.

and

W. C. HARDING LAND COMPANY, a Corporation, Appellant,

vs.

MRS. GLENN D. HART and GLENN D. HART, Appellees.

BRIEF FOR APPELLANT W. C. HARDING LAND COMPANY.

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STATEMENT OF THE CASE.

The Appellees Mrs. Glenn D. Hart and her husband, Glenn D. Hart, filed their Bill of Complaint in the District Court for the District of Oregon on March 9th, 1914, suing for rescission of certain land contracts, the Bill being based upon three alleged causes of suit. First, Mrs. Glenn D. Hart sued as purchaser from the Appellant W. C. Harding Land Company of a tract of Land known as lot number 18 of Plat "D" of Roseburg Home Orchard Tracts, containing 10 acres, in Douglas County, Oregon, at the purchase price of $3500.00, of which $700.00 was paid in cash and the balance was to be paid in installments as shown by a written contract of sale. It is alleged in the Bill that the land was owned, at the time of the making of the contract by Appellee's Walter Adair, J. T. Epperly, James P. Burns, F. S. Green, and L. B. Wallace, who are sometimes referred to in the Record as the "land owners," all of whom, save Wallace, are farmers. The platted land was a part of a larger tract which the land owners had purchased, and under a contrct between them and the W. C. Harding Land Company the latter was to divide the land into orchard tracts and plat the same and place it upon the market. Under the contract between the W. C. Harding Land Company and the land owners the latter were to have $200.00 an acre for the land, and the Harding

Land Company sold the lots in its own name and also made agreements with purchasers to plant the land to fruit trees and care for the same for a period of three years. The land owners were not in any way known in the contracts which the Harding Land Company made for the sale, planting or cultivation of the lands, but such contracts were all made in the name of the W. C. Harding Land Company.

Plaintiff sues for rescission of contract and for the recovery of the installments of purchase prices which had been paid, (the full purchase price never having been paid), on the ground of fraudulent misrepresentations as to the character and value of the land made by the agent of the Harding Land Company at the time of the making of the contract of sale. Plaintiff for a second cause of suit alleges the making of a like contract by the W. C. Harding Land Company with her husband Glenn D. Hart, for the sale of lot 19 of the same plat, containing 10 acres, for the purchase price of $3500.00, of which part was paid in cash, and some later installments paid, but the land was not paid for in full, and it is alleged and proven that on April 23rd, 1912, the said Glenn D. Hart "for a valuable consideration assigned to plaintiff all his right, title and interest, claim or demand in and to said contract." The same fraudulent representations are alleged to have been made by an agent of the Harding Land Company in the sale of

this tract, and plaintiff as assignee asks for rescission of contract and return of the purchase money paid, with interest.

The third alleged cause of suit is based upon a similar transaction in which the Harding Land Company made a contract with one Ella Peterson to sell to her lot 17 of the same plat containing 10 acres, for $3500.00, of which part only of the purchase price was paid, and it is alleged that prior to the institution of this suit said Ella Peterson, "for a valuable consideration, assigned to plaintiff all her right, title and interest, claim or right of action in and to said contract." Like fraudulent misrepresentations are claimed as to the contract made with Mrs. Peterson, and rescission of contract and return of the purchase money paid with interest is prayed for by plaintiff as assignee of Ella Peterson.

The W. C. Harding Land Company was engaged in planting and selling commercial orchard lands in various parts of the county, and represented that its lands were first-class apple lands, and also that peach trees would yield a more immediate profit if planted as "fillers" among the apple trees. Its contract of sale as to each lot provided that it should "plant said tract to apples of the same commercial varieties as planted in the entire plat, as follows: Spitzenbergs and Newton Pippins with peach trees fills not less than forty six to the acre," and it was to

give thorough cultivation and care for three years, and then deliver the orchard to the purchaser.

As to all the tracts it is alleged by plaintiff that the land was not worth to exceed $50.00 per acre and that it is valuable only for ordinary farm purposes when drained by tiling; that it lies very low; is bottom land and in a swale; that during the high water in the rainy season, the nearby creek overflows and sweeps over part of the land during the winter months; that the surface soil is of a stiff, black, sticky substance, while the subsoil is a sort of "joint clay" and very tough and of the nature of hardpan, through which water does not soak or drain; that the soil is not adapted for orchard purposes and is entirely unfit for the growing or production of apples, or peaches, etc.

The Appellant W. C. Harding Land Company admits the making of the respective contracts of sale, the payment of the installments of purchase price as allaged, but denies all fraudulent representations, denies the allegations tending to show that the land is of poor quality, or not adapted to fruit growing and alleges affirmatively that the land is of a deep, rich, fertile nature, and when properly cultivated, is very productive of practically all kinds of vegetables, cereals and fruits grown in the Umpqua Valley, in which the land is situated. And it is claimed that the land is especially adapted to apple-growing.

As shown by the contracts of sale the Harding Land Company agreed with the respective purchasers to plant the lots to apple trees and to also set between the apple trees peach trees known as "fillers," the object being that after the apple trees had reached a certain stage of growth the peach trees would be removed, the intention being to grow upon the tracts apple orchards. It is claimed by plaintiff that at the time of the making of the contracts of sale the agent of the Harding Land Company represented, chiefly by way of printed literature, that upon the apple lands which the Company was selling, peach trees could be planted and yield a profit because of their earlier maturity, while waiting for the apple trees to come into bearing.

The Harding Land Company planted the tracts in question, in accordance with the contracts of sale, to apple trees, with peach tree "fillers," and as required by its contract cared for the trees for three years, at which time it relinquished the tracts to the purchasers. It appeared at the time of the trial that the tracts in question were not in good condition, and this was due to the fact that the respective purchasers had not properly cultivated or cared for the same after the expiration of the stewardship of the Harding Land Company. In the case of the two lots sold to Glenn D. Hart and Mrs. Glenn D. Hart, the purchasers, after the expiration of the three year

period covered by the Harding Land Company's contract, had expressly accepted the lands and caused cultivation to be done by one Carvalho for them. In the case of the tract sold to Ella Peterson, there had been no cultivation or care after the expiration of the stewardship of the Harding Land Company.

The Harding Land Company admitted in the pleadings and upon the trial that the peach trees planted upon these particular tracts had not done as well as peach trees planted on other tracts which it had handled in the same county, and claims, as shown by the evidence, that purchasers were informed of the fact that the peach trees were not thriving and each entered into an agreement with the Harding Land Company that it should substitute pear trees for the peach trees. In the case of the lots sold to Glenn D. Hart and Mrs. Glenn D. Hart, this substitution was fully effected and carried out by the Harding Land Company, but in the case of Ella Peterson, while there was an agreement to substitute pear trees instead of peach trees, this had not been carried out at the time the suit was filed.

The Harding Land Company claims that not only was the land first-class and thoroughly adapted to apple-growing, which was the chief object in view, but that it employed the best experts and the

best methods of planting, cultivation and care, and at the expiration of the three-year period during which it was required to care for the trees, it turned over to the respective purchasers first-class young orchards, strictly in accordance with the contracts as modified, except that in the case of the tract of Mrs. Peterson a minute quantity of the lot was covered by a log and some brush which the employees of the Harding Land Company had failed to remove, and the filing of the suit before the arrival of a suitable season to plant the pear trees prevented the actual planting of such trees in place of the peach trees on the lot of Mrs. Peterson.

The evidence shows that Glenn D. Hart, the husband of the plaintiff, acted for her, having purchased the lot which was purchased in her name, and also the lot contracted for in his name, and transacted all business with the Harding Land Company with respect to said lots; and it also appears from the evidence that within a few months after the purchase of the lots Glenn D. Hart, husband of the plaintiff, become a stockholder, vice-president, director, and sales manager of the Harding Land Company, and was fully conversant with all its affairs, and not only had every opportunity to inspect the lots in question, but did inspect the same repeatedly during the years 1911 and 1912, and never made complaint to any person until just prior to the suit, that either

he or his wife had been in any way defrauded; that when he was informed that the peach trees were not thriving, he expressly agreed with the Company that pear trees should be substituted; that he applied on more than one occasion, for an extension of time to make payments on the lots as required by the contracts, after full inspection and personal knowledge of the lots; that thereafter he accepted the lots from the Company at the expiration of the Company's stewardship of three years and caused a contract to be made with a third party to care for the lots thereafter for himself and wife. As to all the contracts, Appellant claims such ratification and affirmance as precludes rescission.

It is further claimed on behalf of Appellant Harding Land Company that plaintiff can maintain no suit upon the contracts made with her assignors Glenn D. Hart, and Ella Peterson, because the assignments either affirm the contracts, so as to preclude rescission, or the plaintiff is claiming assignments of mere litigious rights which cannot be assigned.

The lots were purchased in the spring of 1910, or nearly four years before the filing of this suit.

The plaintiff sought to hold the Appellee's Adair, Epperly, Burns, Green and Wallace liable for the alleged fraudulent representations, jointly with the Harding Land Company, and sought judgment against said land owners for the installments of

purchase money and interest which had been paid to the Harding Land Company.

The District Court entered a decree in favor of plaintiff and against the Harding Land Company rescinding the contracts in question and awarding judgment for the installments of purchase money which had been paid, together with interest, but refused to enter any decree against the Appellee's Adair, Epperly, Burns, Green and Wallace, on the ground that they were not in any way connected with the sales contracts and were not known in the transactions in question. This Appellant takes no exception to the relieving of Appellees Adair, et al, from liability, as they had nothing to do with making the contracts in question.

SPECIFICATIONS OF ERROR.

The errors assigned and now urged are:

I.

That the United States District Court for the District of Oregon erred in decreeing the following, to-wit:

First: That the purchase of lot eighteen (18) of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefor dated

March 24th, 1910, entered into between Mrs. Glenn D. Hart and the W. C. Harding Land Company, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

II.

In decreeing that the plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in the payments on the purchase contract mentioned in the Assignment of Errors No. 1 herein.

III.

Second: That the purchase of lot Nineteen (19) of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefor, dated March 24th, 1910, entered into between Glenn D. Hart and the W. C. Harding Land Company, and thereafter duly assigned under date of April 23rd, 1912, to Mrs. Glenn D. Hart, by said Glenn D. Hart, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

IV.

In decreeing that the plaintiffs have and recover from the said W. C. Harding Land Company, defendant, the money advanced in payments on said purchase and on account of said contract mentioned in Assignment of Error No. 3 herein.

V.

Third: That the purchase price of lot 17 of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and said contract therefor, dated October 15th, 1910, entered into between Mrs. Ella Peterson and the W. C. Harding Land Company and thereafter duly assigned under date of ..... to Mrs. Glenn D. Hart, by said Mrs. Ella Peterson, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

VI.

In decreeing that plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in payments on said contract and purchase mentioned in Assignment of Error No. 5 herein.

VII.

Fourth: In rendering a decree and judgment in favor of plaintiff for the sum of $5473.81 and for plaintiffs' costs and disbursements taxed at .....

VIII.

In not rendering a decree in favor of the defendant W. C. Harding Land Company and against the plaintiffs, and dismissing plaintiffs' Bill in Equity.

IX.

In not rendering and entering a judgment in favor of the defendant W. C. Harding Land Company and against the plaintiffs for the costs and disbursements incurred by said W. C. Harding Land Company in the trial of the above entitled cause.

ARGUMENT.

Discussion of Facts.

The suit is based upon alleged misrepresentation in the sale of the three tracts of land in question. The position of this appellant is that the evidence shows:

First: That there was no fraudulent misrepresentation whatever but that the lots consist of deep, fertile soil, thoroughly adapted to apple growing, which was the chief object in view on the part of the purchasers, though not so well adapted to peach growing, but the peach trees were only intended as a temporary planting on the land;

Second: That the mistake as to the peach trees was an honest one and was corrected by supplemental agreements between the parties concerned for the substitution of pear trees for the peach trees;

Third: That after full knowledge of the lands

the respective purchasers ratified and affirmed the contracts;

Fourth: And as to the lots contracted to plaintiff's assignors Glenn D. Hart and Ella Peterson, the contracts were affirmed by the very assigments under which plaintiff claims as to those contracts, and therefore rescission is impossible as to them.

We discuss first the facts as to the character of the land.

Facts as to the Quality of the Land.

The plaintiffs relied upon the trial chiefly upon the testimony of L. J. Chapin, County Agriculturist of Marion County, and F. W. Rader, Agriculturist for Lane County. These were two young men, not many years out of college, who had taken college courses in agriculture, but had not taken courses in horticulture, had no practical knowledge worth mentioning of fruit trees, knew nothing about the growing of fruit trees in the locality in question. They claimed to have taken samples of the soil but brought no samples into court, and the only examination they had made of it was by looking at it with eye. They had a theory that such soil is worth $50.00 per acre for agricultural purposes, that it is not good for fruit, that it is impervious to water, etc.

In fixing their valuation it did not seem to make any difference to them where the soil might be located with reference to transportation, accessibility to markets, and so on. In other words it needs no expert to see from their testimony that they were spinning a web of speculation out of a few theoretical notions obtained in college. There is one remarkable and outstanding feature of their testimony that condemns what they said. All the testimony shows that the lots in question in this suit are parts of a tract of land which was formerly a grain field, at least to a large extent, that the field as a whole appears to the naked eye as a practically level and nearly uniform tract of land. The lots in question had not been recently cultivated, because the period of cultivation embraced in the contract of the Harding Land Company had expired some time before, and the purchasers of the lots had failed to keep up the cultivation and care of the trees. It is very evident that this is due to the fact that the boom in fruit trees had collapsed, as the testimony of different witnesses shows. At the same time there were other lots in the same tract on which were growing young fruit trees which had been planted at about the same time, and which trees had had reasonably good cultivation and other care. These trees were in a flourishing condition and were separated from the trees in question in this case only by a roadway 20 feet wide which had been laid off on the plat. The over-

whelming testimony is that there was no difference between the character of the soil or the lay of the ground on the lots in question and on the lots on which the trees were flourishing. The appearance of these flourishing trees is shown by the large photographs introduced in evidence by the defense. See Defendant's photographs, Exhibits, 37, 38, 39 and 40, Record page 189. The testimony of the witnesses is that in traveling along this platted roadway with the lots in question on the right hand and the cared-for lots on the left hand the impression was that one was simply crossing a practically level field, and that the trees on the right hand had not had proper care or cultivation while the trees on the left hand had had such care. There were no differences in the composition of the soil or in any other substantial respect. (See Record, witness McKay, pages 123-4; witness Kitchin, page 130.) When these young agriculturists were confronted with these facts and asked to square their theory as to the soil in question with the showing made as to the growth of the trees on the other lots, they were without any satisfactory explanation, but it plainly and unmistakably appears from their testimony that they deliberately shut their eyes to the facts. No one has questioned or will question the genuineness or authenticity of these photographs of actual conditions existing, and no witness in the case undertakes to say that there is any difference in the soils as to these particular

lots. A number of witnesses testify that the soil on the lots in question is identical with the soil on the lots in which the trees were shown to be flourishing. This testimony included that of witness Adair, (See Record, page 150), witness Green, (See Record, page 197), and witness McKay (See Record, pages 123-4), all of whom had actually cultivated or tilled the identical land in question. Furthermore experienced growers of fruit trees and men of years of actual practical knowledge like witness Kitchin (See Record page 130), and witness Drew (See Record, page 144,) testified from actual examination of the soils that the soil on the lots in question is identical with that on the lots where the trees were flourishing; that the soil is deep, rich and fertile in character, well adapted to the growing of fruit trees, and that had the purchasers of these lots given them ordinary care and cultivation the trees thereon, with the exception of the peach trees, would have been flourishing the same as the other trees on other parts of the plat. As to the peach trees the Harding Land Company, as well as various witnesses for the defense, admitted and have admitted that the soil proved too rich for their successful growing, the testimony of practical fruit growers showing that peach trees thrive better on a lighter and poorer quality of soil. Witness McKay, an experienced farmer and Deputy County Assessor, who had farmed the particular lands in question, testifies at page 125 of the Record:

"The quality of the soil is above the average in that locality. That farm was always considered a good farm, and it is above the average." In this he is corroborated by the witnesses Drew, Green, St. John, Kitchin, Adair and others.

There is abundance of testimony, practically undisputed that the fruit trees planted by the Harding Land Company on the lands in question grew and flourished during the period within which the Company undertook to care for them, and their subsequent deterioration was due, with the exception of the peach trees, entirely and wholly to the neglect of the lots by the purchasers. (See Record, page 193. Witness Green.) It will be remembered as to the two Hart tracts that Hart caused a contract to be made with one Carvalho for the cultivation of his lots, but the testimony shows that Carvalho did not give them proper care. This, of course, was not the fault of the Harding Land Company. (See testimony of Hinkley, Record pages 136-7.)

With reference to the failure of the peach trees to grow upon this land, the testimony shows that when the lots were sold the agent of the Harding Land Company produced advertising matter of the Company setting forth that peach trees could be planted as "fillers" and would begin to bear in about three years, and thus bring in profit before the apple trees would mature, and of course, the intention was

that afterwards the peach trees would be removed so as to give the whole of the soil to the apple trees. This literature was general in character but there is no doubt that the agent of the Harding Land Company represented and the Company expected that these statements would apply to these particular lots. All the testimony in the case shows, however, that these representations were innocently and honestly made, that a part of the soil in question was really too rich for the successful growing of peach trees. As to why the peach tree will flourish on a lighter and poorer soil we need not stop to discuss. All fruit-men agree upon this. The plaintiffs utterly failed to show any misrepresentation whatever except as to the peach trees, and the Harding Land Company, long before suit was filed or threatened realized and frankly admitted that the soil in question was not adapted to peaches; although some of the peach trees did grow and flourish and the testimony shows that they were bearing fruit at the time of the trial (See Record page 129, Witness Kitchin). As shown elsewhere in this brief, this matter was taken up with Mr. Hart who authorized the Company to replace the peach tress with pear trees which were found to be better adapted to the soil in question, and that under authority from Mr. Hart this replacing of trees was done. (See Record, page 212, Witness Wallace.) The same agreement was also made with Mrs. Peterson. (Record, page 136, Hink-

ley.) Therefore, the only misrepresentation in the case was an innocent one, and was atoned for and the matter cured between the parties long before the suit was filed.

As further bearing upon the quality of the soil the Bill of Complaint shows that plaintiffs undertook to say that the soil in question was in a "swale," that it was wet land on which the water stood and that there was a "joint-clay" on the land, and that the land was practically worthless for fruit-growing purposes. A number of witnesses who have known the land for years, testified that it is not in a swale; but that it was formerly, for the most part, embraced in a grain field; that the water does not stand upon it; that it has been worked even in the rainy season, and that there is no such thing as joint-clay present. See the Record, page 120, et seq, Witness McKay; page 149, Witness Adair; pages 197-8, Witness Green.

All the testimony shows that the land was platted as a bona fide orchard proposition, by a Company which had platted and planted thousands of acres in the same county in the same way. The Record shows the price which the land owners paid for the land, shows that they were most of them practical farmers (Record, page 148,) that they examined the land embraced in the plat carefully before purchasing, (Record, page 148,) that they con-

sidered it a bona fide orchard proposition and that two of the land owners, namely, Adair and Green, purchased small tracts for orchard purposes from the Harding Land Company at the same rate per acre for the land that the plaintiffs agreed to pay. See the testimony, Record page 150.

We ask the careful comparison of the testimony of the alleged agriculturists offered by the plaintiffs, with the testimony of Drew, a disinterested witness, a man who has spent a life-time in the growing of fruit trees and the study of soils, and with the testimony of Kitchin, also disinterested, a man of many years' experience in the same line, and who at the time of testifying, was manager of the Umpqua Valley Fruit Union, an association of practical fruit-growers. We also call especial attention to the testimony of St. John. (See Record, page 155,) a witness interested in a large orchard company which had planted hundreds of acres of successful young orchards upon the same kind of soil, located within a few miles of the lands in question. We also call attention to the testimony of these witnesses, and other witnesses, showing that when the lands in question were contracted to be sold orchard lands were greatly sought after, prices were booming, and people expected to make fortunes out of fruit trees; that afterwards and at the time the suit was commenced the boom had collapsed, orchard

lands had become less desirable, no matter what their quality, and a motive clearly existed for the plaintiffs in this case to allege fraud and seek rescission of contract in order to recover payments made by them.

The planting of orchards on a commercial scale was, when the Harding Land Company began its operations, a new thing in Douglas County, and in that county as well as in other localities on the Pacific Coast which appeared to be adapted to the growing of apples there was a wide-spread belief that this industry was upon the eve of extensive and profitable development and that large returns could be secured from it. Naturally every one who invested upon the strength of this common belief was looking to the future, as of course it was a matter of 6 or 8 years before apple orchards could be brought into bearing, and naturally also, there was in the whole movement undue optimism and enthusiasm. No one in particular should be blamed if the future of this industry was universally painted in colors too glowing and attractive. This is the history of all activities of the human mind. The pendulum swings first to one side and then to the other. Today people are looking forward to great returns from the planting of corn or the raising of cattle, or the acquiring of timber lands or the exploiting of mineral resources; tomorrow the public interest will be cen-

tered in fruit-growing or railroad building or shipbuilding or the selling of town lots, and so on. Invariably these waves of enthusiasm and feverish activity have in them a fictituous element which at the time is not realized by the public. This was the situation as to the planting of the apple orchards in Douglas County at the time the Harding Land Company planted and sold the lots in question. There is nothing in the record that lends color to the contention of plaintiffs that any one connected with the transaction had any fraudulent purpose or corruptly misrepresented anything. The officers and managers of the Harding Land Company selected rich and desirable farm lands which they and their advisors had every reason to believe would be thoroughly adapted to the growing of fruit trees. There is no testimony in the Record worthy of serious consideration that shows that this land is not well adapted to the growing of apple trees. Nothing in the Record shows that the officers and agents of the Harding Land Company were any more to blame than the plaintiffs. So far as the Plaintiffs Hart are concerned, Mrs. Hart was represented by her husband, a stockholder, director, vice-president, and sales agent of the Appellant Harding Land Company, who had every opportunity to investigate and know all the facts, and who, as the testimony shows, in fact, fully investigated and after full knowledge expressed satisfaction with the lots, promised payments,

entered into contract for cultivation of the lots at his own expense, and fully accepted the property, and in every respect ratified the purchase, including the replacing of the peach trees, which unexpectedly failed, with pear trees. No reason or motive can be shown, for the attempted repudiation of the contract or for the cry of fraud which is now made, save that, as the Record abundantly shows, the public mind became sobered, financial stringency came on, the demand for orchard lands abated and these plaintiffs realized it would be more to their interest to get back the money they had paid, than to carry out their contracts.

We regret to say that the Record shows that the learned Judge who tried this case in the court below appears to have overlooked many salient and undisputed elements of the testimony. We refer to page 219 et seq, of the Record, where it will be noticed that the learned court states that the Harding Land Company proceeded to offer this land for sale outside of the state of Oregon, and to people who were not familiar with the locality, and makes no mention of the fact that the testimony shows that some of the platted lots were sold, for example, to Adair and Green, (See Record, page 150) who had purchased the larger tract and that they paid $200.00 per acre for their lots, which was the same price charged to plaintiffs in this case for the naked lands

Furthermore the learned court seems to overlook the testimony which shows that the lands in question were of first-class character and that there was not an iota of misrepresentation, except as to the adaptability of the land to the growing of the peach trees, which were intended merely as "fillers" to remain temporarily. The learned court makes no mention of the subsequent examination of the lands and the ratification and affirmance of the contracts by the plaintiff and her assignors, attaches no importance to the connection of Hart with the Land Company itself, and fails to realize that the price of $350.00 per acre included not only the price of the land which was to be $200.00 per acre, but covered the cost of planting the lots with fruit trees and caring for and cultivating the same for a term of three years.

Again the learned trial court said at page 222 of the Record:

"The defendant produced a good many witnesses to testify that in their opinion it would produce good orchards, but it was a striking feature in the case that no witness was produced who testified that he knew of any profitable commercial orchard growing in Douglas County on such land. And, under the circumstances of this case, I think, in the first place, that where exploiting companies make representations of this kind to intending purchasers outside the state and persuade them not to examine

the land, they ought to be held to strict accountability, and the judgment of this court is that the plaintiff is entitled to a decree setting these contracts aside, and a judgment against the Land Company for the money they have paid on them, and for the costs of this proceeding." We regret that the court in this part of its statements overlooked the fact that the planting of commercial orchards had just begun in Douglas County, that the witness Adair, one of the land owners stated that one circumstance that satisfied him of the value of the land for growing apple trees was that he knew of apple trees that were growing successfully upon the same kind of soil in the same county. See Record, page 148. See also testimony of St. John, Record p. 155. Furthermore the court unfortunately failed to take notice of the fact that other lots in the same plat, as shown by defendant's photographs, (See Defendant's Exhibits 37, 38, 39 and 40) were successfully growing these trees, because the purchasers had continued to care for them after the Harding Land Company's stewardship ceased.

The writer of this brief was born and reared in Oregon. From his early boyhood days he has heard wise men say that the greatest draw-back to the development of Western Oregon was the fact that so many individuals held large tracts of land which were not properly cultivated nor made to produce

such an income as they were capable of producing. These wise men have always contended that the country would never be prosperous until these large tracts were subdivided and intensely cultivated.

During the past six or seven years a number of different individuals and syndicates have been engaged in buying up these large tracts of land, subdividing them and planting them to orchards and reselling them. In fact, at the time the plaintiff and her assignors purchased the tracts of land involved in this litigation small tracts planted to fruit trees were very much in demand.

The literature used by the defendant corporation in exploiting the land offered for sale by it is of the ordinary kind. It is not unreasonably extravagant. It is common knowledge that not every particular tract, even in the same locality, will produce the same kind of fruit or other vegetation. Sometimes the difference in the production of two different tracts of land in the same vicinity cannot be accounted for. Sometimes it is due to the soil. At other times it is entirely due to atmospheric conditions. That the representations made in the literature sent out by the defendant corporation were not false in general, or made to mislead is abundantly established by the evidence. While the three particular tracts involved in this litigation may have been misrepresented in this, that peaches will not

grow successfully, yet we insist that the preponderance of the evidence clearly establishes that they will grow other fruit. It isn't a question of guessing because other tracts of the same large tract separated from those involved in this litigation only by a twenty foot road, demonstrate that fruit trees thrive and flourish there.

Now in the light of all these circumstances and these conditions, with the opportunity these parties had of examining the land for themselves, how can it be said that the defendant corporation defrauded the plaintiff and her assignors? We believe the evidence establishes very clearly that the representations made about the land were made in the utmost good faith, honestly believing them to be true. The evidence clearly demonstrates that those representations are true, except in the one particular, which was a representation of what might be done and not a statement of actual quality or condition which could have been determined without experiment.

Surely the defendant corporation is not to be found guilty of fraud because it has made an honest mistake in the transaction of an honest business with everything done openly and above board and with the plaintiff and her assignors given every opportunity to investigate.

The evidence clearly shows that as soon as the

defendant corporation became aware that the lands sold to the plaintiff and her assignors was not adapted to the producing of peaches it openly and frankly informed the plaintiff and her assignors of that condition and offered to make the mistake good by interplanting pear trees. The plaintiff and her assignors agreed to this. The plaintiff and her husband went so far as to make contracts with other persons for the cultivation of their several tracts but the contracts were not executed, and the orchards neglected. The consequence is, the trees have deterioated.

The demand for small tracts planted to fruit has waned. Those who have invested in such tracts without first carefully computing the cost find it quite an expensive experience to properly cultivate a tract of land planted to fruit trees and properly care for the trees until they come to the bearing period, consequently a great many who invested in small tracts of land planted to fruit trees in the Umpqua Valley would like to be released from the burden they have assumed. The plaintiff and her assignors are among such. In order for them to do so they seek to cast the cloud of fraud upon the defendant corporation and its officers.

We believe also that the evidence very clearly shows that the defendant corporation was as much deceived by the failure of the tracts of land in question to produce peaches as were the plaintiff and her

assignors. We believe that the defendant corporation showed anything but an intent to defraud or work an injury when it offered at its own expense to replant the trees that had died with trees that experience had taught would flourish in that particular soil and locality. We believe that the evidence adduced by the plaintiff falls short of establishing fraud. At the most a mere mistake has been shown. The land was purchased by the plaintiff and her assignors for the purpose of growing apples.

Facts Showing Ratification and Affirmance.

Hart testifies he first saw the land in July, 1912, (Record, page 82); that he tried to see it in January, 1911, but it was covered with four inches of snow; in February, 1912, it was covered with water. He testifies that he entered into business with the defendant Harding Land Company as sales agent in 1911, (Record, page 83). He identified the written contract, dated March 2nd, 1911, under which he became an agent to sell fruit lands for that Company, the Company which he now claims defrauded him. He and his partner became practically exclusive sales agents for the Company, selling just such lands planted to young orchards as he and his wife bought from the Company. He identified a letter dated April 12th, 1912, Defendant's Exhibit A, (Record, page 85,) remitting to the Harding Land Co.,

four hundred dollars to apply on the very land in question, and this, according to his own testimony, was after his second visit to the land. What he says about snow and water on the land is not worthy of great weight. This would not prevent his seeing the young trees, the orchards on neighboring lands, the topography of the land, and in fact anything except the mere texture and quality of the soil. But further, the testimony shows that the snowfall was quickly gone and he admits he remained in the vicinity a week without going back after the snow had melted. The testimony of Green, (Record, page 198) and McKay (Record, page 123) shows that water has never stood on this land so as to prevent inspection of it. After his return to South Dakota, he wrote, under date of March 8th, 1912, Defendants Exhibit 3, in which he writes to Harding, the president of the Land Company: "The trip was beneficial to me in more ways than one. I saw the country and when it was looking fine, and I can talk it all the more. Expect a big business here for a few months." He says when he wrote this letter he was vice-president of the defendant Harding Land Company, owned stock and was a member of the board of directors, the Company he now sues for alleged fraudulent sales to himself and wife. The testimony of the plaintiff, Mrs. Hart, is (Record, page 80,) that her husband represented her in all matters connected with the land. As to his activity in the affairs of the Land

Company, we ask attention to his letters in evidence, found at page 85, et seq, of the Transcript of Record. And we ask attention to his letter of June 27th, 1912, (Record, page 88,) in which he stated that he had sold the two tracts owned by him with the W. C. Harding Land Company to Mrs. Glenn D. Hart (his wife) and that she was doing everything in her power to make a payment on the one he owned in Plat D (land in question). It will be noted that this letter was written after he had twice visited the land, and of course while he was thoroughly familiar with all operations of the Harding Land Company, being himself one of the chief officers of that Company.

Defendant's Exhibit 13 is a letter written by Hart under date of August 23rd, 1912, in which he proposes to return to Harding the stock which he owned in the Company and take back his notes. Again in Defendant's Exhibit 15 (Record pp 89 and 90), under date of March 20th, 1913, Hart writes to Harding, among other things: "I am for you all the time. I hope that you will prosper and that your company will be the biggest in the world in a few years." This does not sound like a communication from a man who had been defrauded in the sale to him of a piece of land, with which he had then become thoroughly familiar.

Under date of November 6th, 1912, Hart wrote to

an officer of the Harding Land Company, Defendant's Exhibit 20, (See Record, page 90), in which he says: "I am thinking seriously of caring for my wife's tracts in Plat D this coming year myself. I have a certain knowledge of how to look after an orchard, so will try my hand at it." This letter was written after repeated examinations of the land in question, refers to that very land, and is to the effect that Hart himself knew something about the care of an orchard, as well as how to sell the same.

We ask the careful reading of other letters which are shown in the Record, written by Hart, showing his intimate connection with and interest with the Harding Land Company, which Company he now claims defrauded him in the sale of the land, showing that he had every opportunity to know and did know all about the land, and by his repeated statements showed his satisfaction with the character thereof.

These letters are absolutely inconsistent with any conclusion that Hart was, or could have been deceived or imposed upon in the manner which he claims.

He was strictly on the "inside" and the effort now made to recover what was paid on the land is similar to Hart's action in soliciting Harding to take back the stock which Hart had purchased in

the Harding Land Company. It must be remembered, as Mrs. Hart herself says, Hart represented and acted for her at all times with reference to this land, besides being himself an original purchaser from the Harding Land Company. We ask special attention to his testimony on redirect examintion. (Record, pages 91-2), where with reference to the alleged representations made to him at the time of the sale he says: "I first learned about the falsity of these statements after my wife had turned the proposition over to her attorneys and they had made an investigation and reported, in May, 1913; down to then I believed that this land was as represented." Is it not extraordinary that a man engaged in the business of selling orchard lands should be so innocent and gullible that he did not know that he had been defrauded until he consulted an attorney?

We have thus far directed the court's attention solely to the testimony of Hart himself in connection with his own letters introduced in evidence. We now desire to call attention to the testimony of others showing his full knowledge, as well as his opportunities to know all about the land, his satisfaction with the land, and his full ratification of everything until the time came when the boom in orchard lands collapsed, and Hart conceived the idea that by alleging fraud he might bring about the rescission of the contracts and get back the money that he and his wife had invested.

R. W. Hinkley, a witness on behalf of the defendants, (See Record, page 136), testified that he was for a time employed by the Harding Land Company and that during the winter of 1912-13 there was a conversation in the office of the Company between Mr. Harding, Mr. Hart and himself, and says: "As I understood it the Harding Land Company's time for cultivating that land was up with the season of 1912, and Mr. Harding and Mr. Covalho had made some arrangements for the cultivation in 1913, and Mr. Hart asked me to write out a contract between him and Mr. Covalho for the cultivation during 1913, which I did. The cultivation was to be at Mr. Hart's expense, and the contract covered lots 18 and 19 in Plat D. Mr. Hart made no complaint at that time that I heard. He requested Mr. Harding or I to sign the contract with Mr. Covalho for him because he was going to leave at that time, or that night. It was written out and Mr. Covalho signed it, and I think Mr. Harding also signed it for Mr. Hart." The lots sold to the Harts are numbered 18 and 19 in what is called Plat D.

W. C. Harding, the president of the Harding Land Company testifies at page 161 of the Record as follows: "I remember Mr. Hart visiting the tract again in February, 1912. He was at Roseburg and we had a stockholders' meeting of every stockholder of the Harding Land Company, that lasted about a

week, and Mr. Hart was at Roseburg for a week or ten days, and virtually everything of interest with regard to our orchard plantings both personal and from a company standpoint was discussed at that time. * * * * * I remember Mr. and Mrs. Hart's visit to Roseburg again in July, 1912, I do not think I visited their orchards with them at that time. I talked with them both while they were at Roseburg. We did not particularly discuss their own orchard tracts only that they both expressed pleasure over the thought of quickly coming to the Umpqua Valley or Oregon to live. I do not think either of them made any complaint to me at all about the condition of their orchard or the land on which it was planted at that time * * * * I heard the testimony of Mr. and Mrs. Hart to the effect that I promised at that time to sell the tracts near Wilbur and give them some land near Garden Valley. The fact is I didn't make any such promise. Mr. Hart was our sales agent at that time. Our Roseburg office made very little effort in attempting to sell land. I personally made practically none. Furthermore I couldn't have promised anything at Garden Valley because everything at Garden Valley had been sold for nearly three years, with the exception of the hills and some few tag ends that weren't worth while." Again at page 164 of the Record, Harding testifies: "Mr. Hart after his election to the legislature came to Oregon some time the

latter part of December, 1912; at that time I called his attention to the fact that our stewardship had virtually ceased, and it would be up to him to care for his tract the next year. We had a former discussion about this matter back in Dakota when I was there in September, 1912, and Mr. Hart authorized Mr. Hinkley and myself as his agents, to go into contract with Mr. Cavalho. * * * * We entered into this contract with Mr. Cavalho for Mr. Hart and he had charge of the orchard from that time on. This arrangement was not made because we were short of funds, it was because our time for caring for his orchard had expired." Again at page 166 of the Record, Harding testified: "The main conversation I had with Mr. Hart as to his getting further time on his payments was back at Deadwood, South Dakota, in September, 1912, at the time I was there for a week or ten days. Mr. Hart was very much worried because Mr. Eddy insisted on payment, Mr. Eddy being trustee as between the land owners and the lot owners, that is the original land owners, the Harding Land Company and the purchasers. * * * Mr. Hart said that until they sold their news stand they didn't have the money to pay Mr. Eddy, and suggested that I get Mr. Eddy to give him a deed and mortgage to these tracts, in other words to deed the land to the Harts and take a mortgage back." (Record, page 167.) "I don't remember that Mr. Hart ever made any complaint to me about his orchard

or the condition in which he found it during all of these conversations I had with him. I first knew Mr. and Mrs. Hart were dissatisfied when suit was threatened in 1913, the summer or spring. Mr. Hart was then represented by the same attorney who now represents him."

As still further bearing upon the fact that after full knowledge of the land purchased by Mr. and Mrs. Hart, gained by repeated visits to the same, and while Hart was engaged in the identical business of selling orchard lands, we would call attention to the testimony of J. D. Zurcher, a disinterested witness, see Record, page 187. Witness was secretary of the Roseburg Commercial Club, and he testified at page 191 of the Record: "I am well acquainted with Mr. Hart and I met Mrs. Hart at the time she visited Roseburg in 1912. * * * * I talked with both Mr. and Mrs. Hart in the office of the Harding Land Company, and I asked them when there how they liked Douglas County, or especially Mrs. Hart, because it was her first visit, and how they liked their investment and she told me they were well satisfied. She said they had been out looking at their tract and they were well pleased with it. She said the tract was over at Wilbur. * * * * I had several occasions to talk with Mr. Hart about his investment there in Plat D, and each time he told me it was fine, and he was coming there to live."

L. B. Wallace, who was at one time secretary of the Harding Land Company, testifies at page 211-2 of the Record with reference to the growth of the trees on the lands sold to the Harts, and says the apple trees were healthy, but the peach trees did not do well in the first year. "We thought that the peach trees would grow after they had a year's growth on these two lots, 18 and 19, and in the spring of 1911 we replaced a few peach trees that had died with new peach trees and we did not satisfy ourselves until 1912 that peach trees would not make a satisfactory growth in this land, so we first took the matter up with Mr. Hart in February, 1912, I think. This was in the office of the Harding Land Company at Roseburg. Mr. Hart was acting as one of the sales managers of the Harding Land Company, and was after he had become a stockholder. Mr. Hart said to go ahead and replace the dead peach trees with pear trees. The peach trees that had not died were not replaced. This arrangement referred to both lots 18 and 19. After that we planted trees, replanting the dead peach trees with pear trees in the spring of 1912." * * * * (Record, page 212.) "I remember Mr. and Mrs. Hart visiting Roseburg in July, 1912, and going out to Plat D, but don't know who took them out." (Record, page 213.) * * * "I had a talk with them in July, 1912, with reference to their Plat D land and they seemed to be perfectly satisfied, with this ex-

ception, Mrs. Hart seemed to be disappointed that the peach trees had not proven to be satisfactory on these tracts, but when I mentioned to her the fact that Mr. Hart had instructed us to plant pear trees she seemed to think the Company had done all that they could do and apparently was satisfied. Neither one of them told me that they were dissatisfied with these lands to my knowledge. No one who has ever purchased any land in Plat D through our Company ever indicated to my company or myself in any way any dissatisfaction with the soil in Plat D. The chief failure or difficulty in Plat D was the peach trees, the pears and apples on 18 and 19 were good."

We have made the foregoing notes from the testimony and from Mr. Hart's letters as showing full ratification and acquiescence in the sales contracts long after he and Mrs. Hart had full knowledge of the land and of the conditions. The Company's representations as to peaches had partially failed on these tracts, but the Record shows that this was not due to any fraudulent misrepresentations, but to an honest mistake, which was rectified with the express knowledge and consent of the Harts by replacing the peach trees with pear trees. Long after this was done Hart took over the lots, assumed the future care and cultivation of the same, and authorized the making of the cultivation contract with Carvalho on his behalf.

In taking up the consideration of the matter of ratification and affirmance by Mrs. Peterson we must ask the court to especially observe that part of her testimony found on page 97 of the Record, reading as follows: "I purchased my land in April, 1910. It was planted the next fall. I saw rocks all over the tract, I thought they were pretty thick for a first class orchard tract to be properly taken care of, and some of them were a pretty good size----as big as my head and larger----I couldn't say whether they were smooth rocks, waterwashed rocks or whether they were igneous rocks, found in the hills." Even a hasty examination of the testimony in the case will show that these statements of Mrs. Peterson about the rocks on the land were false. Every witness in the case on either side, who was asked about the rocks, said that he had seen nothing of the kind. Men who had cultivated the land repeatedly and had been over it time and again testified that nothing of the kind existed on the tract. (See Record, pages 105, 127 and 202.) This testimony should be remembered, in considering the other testimony of Mrs. Peterson, in which she undertakes to tell of the condition in which she found her tract, of the statements which she says the officers of the Harding Land Company made to her, and her denial of the agreement claimed by the Company as to replacing dead peach trees with pear trees.

The witness, Hinkley, testifies at page 134, of the Record: "Mr. and Mrs. Peterson both visited the land and I took them out in an auto. At that time the tract looked to me as though it had just been disked, gone over with a disk, presumably, and the dirt had been thrown towards the trees a little, and had a little rough appearance, very few weeds on it at that time, and the cultivation was such as in the orchards generally at that time of the year. In the cultivation of orchards, after using the disk I have always gone over it with a harrow, the fact that there were some clods would not necessarily indicate a lack of care at that time." Again at page 136 Hinkley says: "After we had examined this lot I heard part of the conversation, at least, had between Mr. and Mrs. Peterson and Mr. Harding. It was held in the office of the Harding Land Company, I think the following day. The substance of it was that we agreed to plant pear trees in place of the peach trees on the tract the following winter, and we gave her a written statement. I believe they left the office, and we were to write out this statement and Mr. Peterson came back and I gave it to him. Mrs. Peterson was there and heard and understood what was said about settlement. I wrote out the memorandum; I won't say whether Mr. Harding dictated it to me or whether I wrote it out myself, but I wrote it on the typewriter myself." * * * * "I understand that Mrs. Peterson accepted it

as satisfactory as nothing was said otherwise." The memorandum of agreement referred to in this testimony appears at page 98 of the record, and shows that the Harding Land Company was to remove the peach trees on the land, which had been planted as "fillers" in the rows between the apple trees, and plant in lieu thereof pear trees, part Bartletts and part de Anjous, etc.

Mr. Harding, president of the Harding Land Company, testifies at page 162 of the Record: "I heard the testimony of Mrs. Peterson about her visit to her tract No. 17. She was not pleased with her orchard and said she looked for larger trees. I remember one statement she made that it didn't look as large as an orchard that her father at one time planted back east, but I suggested that possibly orchard methods might have changed in the last few years, and the question of pruning, and things of that kind, might have changed decidedly since that orchard back east was planted. We agreed with Mrs. Peterson to plant pear trees in place of the peach trees; in fact, give her a full planted pear orchard, as well as apple orchard, with the suggestion that in the course of a number of years, she could then make a choice between pears and apples. She and Mr. Peterson both assented to this. We gave her a letter which Mr. Hinkley who was then secretary of the Harding Land Company, and my-

self as president, both believed would act as a supplemental contract."

Points of Law.

I.

The right to rescind a contract upon the ground of fraud may be lost by delay, as it is the duty of the person claiming to have been defrauded to act promptly upon discovery of the fraud. He cannot sit on the fence and wait for developments to indicate whether his interest will call for affirmance or rescission. If he is to rescind he must do so promptly. Acts of ownership after knowledge of the alleged fraud will preclude rescission.

Scott v. Walton 32 Or. 460, 52 Pac. 180, 181;

Dundee Mortgage and Trust Company vs. Goodman, 36 Or. 453, 60 Pac. 3;

Vaughn v. Smith, 34 Or. 54, 55 Pac. 99;

Elgin v. Snyder, 60 Or. 297, 118 Pac. 280;

Whitney v. Bissell, ... Or. ..., 146 Pac. 141; L. R. A. 1915 D. 257;

Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed 419;

Grymes v. Sanders, 93 U. S. 62, 23 L. ed. 798.

Simon v. Goodyear Metallic Rubber Shoe Co., 44 C. C. A. 612, 105 Fed. 573, 52 L. R. A. 745.

II.

Under all the authorities, after a party claiming to have been defrauded has acquired knowledge of the facts, if he affirms the contract there can be no rescission.

Faulkner v. Wassmer, (N. J.) 77 Atl. 341, 30 L. R. A. (N. S.) 872, and note in L. R. A.
14 Am. and Eng. Enc. Law (2nd ed.) 159, 161.

III.

Representations as to prospective profits from the peach trees cannot be relied upon as statements of fact, but amount only to expressions of opinion.

39 Cyc. 1274;
Gordon v. Parmelee, 2 Allen 212.

IV.

Assignment by the purchasers of two of the three contracts in question affirmed the contracts and prevents rescission, especially as the assignments were made after full knowledge of the facts.

Cooper v. Hillsboro Garden Tracts, (Oregon,) not yet officially reported, 152 Pac. 488.

The Oregon case of Whitney v. Bissell, ... Or. ..... 146 Pac. 141, (decided in February, 1915,) was a suit brought to foreclose a mortgage on orchard land. The defense was that there was mis-

representation as to the value of the products of the premises for a given year. The court held against the defendant on the ground that there had been ample opportunity to learn the truth and he had by his delay lost the right to rescind the contract. In the report of the case found in 146 Pac. at page 144 the court says: "As held in Scott v. Walton, 32 Or. 460, 52 Pac. 180, a party induced by fraud to make a contract has, upon the discovery of the fraud, an election of remedies, either to affirm the contract and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated. * * * * If he desires to rescind he must act promptly. * * * * He cannot retain the fruits of the contract awaiting further developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, especially in remaining in possession of the property received by him under the contract and dealing with it as his own, will be evidence of his intention to abide by the contract. See, also, Vaughn v. Smith, 34 Or. 54, 55 Pac. 99; Sievers v. Brown, 36 Or. 218, 56 Pac. 170; Elgin v. Snyder, 60 Or. 297, 302, 118 Pac. 280."

On the same page the court proceeds further: "The rule as to the knowledge of the fraud before there would be an acquiescence therein is subject to the principle that notice of acts and circumstances

which would put a man of ordinary prudence and intelligence upon inquiry is equivalent in the eyes of the law to knowledge of all the facts a reasonably diligent inquiry would disclose. 6 Cyc. 305; Clark on Contracts, page 236." * * * * "Under the circumstances of this case, it does not appear that defendant Bissell indicated a desire to rescind the contract within a reasonable time after he could have discovered the alleged fraud by the use of due diligence, which amounts to the same things as a discovery. He failed to act promptly in the matter, retained the possession of the land, cultivated the same for a long time, set out fruit trees, speculated upon a rise in the market both as to crops and real estate, and asked and obtained an extension of time for the payment of a portion of the interest, a part of which he paid on his notes, without making any complaint after he knew or should have known the condition of affairs. We think he should be deemed to have affirmed the contract and waived his right to rescind. See Strong v. Strong, 102 N. Y. 69, 5 N. E. 799; Kingman v. Stoddard, 85 Fed. 740, 29 C. C. A. 413; Van Gilder v. Bullen, 159 N. C. 291, 74 S. E. 1059; Simon v. Good year Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745."

Some of the leading Oregon cases upon the question are cited in the opinion from which the above quotations are taken. The rule in Oregon

clearly is that not only must the vendee act with promptness after the actual discovery of the fraud, but that he must act promptly after he has notice of facts and circumstances which would put a man of ordinary prudence and intelligence upon inquiry. So it was held by the Supreme Court of California in the case of Lee v. McClelland 120 Cal. 147, 52 Pac. 300, that means and opportunity of acquiring knowledge of fraudulent representations inducing the sale of land are equivalent to knowledge. See also Evans v. Duke, 140 Cal. 22, 73 Pac. 732;

In connection with the New Jersey case of Faulkner v. Wassmer 77 Atl. 341, 30 L. R. A. (N. S.) 872, there is an extensive note bearing upon the waiver of a purchaser's right to rescind a contract for purchase of real property, and the ground of delay is fully treated with a large citation of authorities. In the case of Grymes v. Sanders, 93 U. S. 62, 23 L. ed, 798, at page 802, of 23 L. ed. Mr. Justice Swayne says: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once indicate his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.

He is not permitted to play fast and loose." Our position is that the record in this case shows precisely this disposition on the part of the purchasers of the lots in question to play fast and loose. Hart, the husband of plaintiff, who purchased one of the lots in question for himslef and one for his wife, as a stockholder, director, vice-president and sales agent of the Harding Land Company, had every opportunity to have full knowledge of the whole situation as to fruit lands and as to the location, quality and condition of the lots in question. He not only had the opportunity to have knowledge but he had actual knowledge by personal inspection repeatedly made during a period running from one to two years before suit was filed, and before any complaint was made to the Harding Land Company or any demand for rescission made. As to the lot purchased by Mrs. Peterson, the Record shows that the Harts were her old friends and her advisers, and while she herself did not have the same opportunity to know the truth and did not inspect the land so soon, yet the Record shows that full settlement was made with her as to the matter of peach trees, and she had no other ground of complaint whatever. She denies that she made the subsequent contract with reference to the replacing of the peach trees with pear trees, but the weight of the testimony is

against her. Against her is the writing given her by the Harding Land Company, which was produced in court upon the demand of this Appellant, and also the testimony of the witness Hinkley, who was at the time of testifying absolutely disinterested. When she made the arrangement as as to the substitution of pear trees for peach trees she affirmed the contract as thus modified. A contract cannot be rescinded or disaffirmed after it has once been affirmed expressly or impliedly with the full knowledge of the alleged fraud. The party may have a right to rescind, but is not bound to do so, and when he has once made his election he is bound by it. See Faulkner v. Wassmer, (N. J.) 30 L. R. A. (N. S.) and note, 872; 14 Am. and Eng. Ency. of Law (2nd ed.) 159, 161. See also the case of Provident Loan and Trust Company v. McIntosh, 68 Kan. 452 reported in 1 Am. and Eng. Ann. Cases, page 906, where there is an extensive note citing cases from English, Federal and State courts in support of the proposition that delay in rescinding a contract is to be construed as an affirmance of the contract.

The Record also shows in addition to the affirmance of all the contracts in question by the making of supplemental contracts for the planting of pear trees, that Hart on behalf of himself and wife, and long after he had seen the property, asked

for time to make payments, which also amounts to an affirmation of the contracts. See Transcript of Record page 88.

As To Peach Trees.

What has been said as to the effect of delay, of asking time on payments, of the making of the supplemental contracts as to the peach trees, of taking over the cultivation of two of the lots, is not intended to be taken as a waiver of our position that the record shows conclusively that there was no fraudulent representation whatever, and that the land in fact was all that it was represented to be, except merely an innocent misrepresentation that it was good for peach trees. As to this representation, it is not claimed that the selling agent of the Harding Land Company represented anything more than that the land **would** produce peaches profitably and that there was an estimate as to the quantity of peaches which it would produce at the end of a given period in the future. There was no representation that the land ever **had** produced peaches or as to what any crops had been. In 39 Cyc. page 1274, the rule on this subject is stated as follows: "A false statement by the vendor as to profits or income actually received by him from the realty contracted for concerns a material fact, is not a matter

of opinion and may amount to such fraud or misrepresentation as avoids the contract of sale. But a statement by the vendor as to his opinion of the profits which can be derived from the realty contrated for, as distinguished from a statement of fact of the profits actually made therefrom, does not amount to fraud or misrepresentation."

"Affirmations concerning the value of land or its adaptability to a particular mode of culture or the capacity of the land to produce crops or support cattle are only expressions of opinion founded on judgment about which honest men might differ materially. Although they might turn out to be erroneous or false they furnish no ground of presuming any fraudulent intent." Gordon v. Parmelee, 2 Allen, 212.

Fraud is defined as a false representation of fact made with knowledge of its falsity, or recklessly without belief in its truth. There was no such misrepresentation even as to the peach trees, the testimony showing that the Harding Land Company had every reason to believe that the soil in question was as well adapted to peaches as other soils of the county, which had produced peaches successfully. In fact the testimony shows that the soil in question was probably not well adapted to peaches be-

cause of its being too rich, not because of poor quality. The misrepresentation as to the peaches was not only cured by the supplementary contracts, but it was innocent in the beginning.

Affirmation by Assignment of Contracts.

While we believe it clearly appears from the Record that there was no fraudulent representation as to the sale of any of the three lots in question; that the land is in fact deep, fertile soil, well adapted to orchard purposes; that each of the purchasers has after full knowledge of the land ratified the contracts with modifications as to peach trees, and accepted their respective tracts, and thus have fully affirmed the contracts and are not in any position to claim the equitable relief which they now seek, namely, rescission of contract, at the same time there is a further and conclusive reason why there can be no recovery in this case on the part of the plaintiff for the lot sold to Glenn D. Hart or the lot sold to Ella Peterson. It will be remembered that there were three lots, namely, 17, 18 and 19. Lot 18 was contracted to the plaintiff, Mrs. Glenn D. Hart, while lot 17 was contracted to Ella Peterson, assignor of plaintiff, and lot 19 was contracted to Glenn D. Hart, husband and assignor of plaintiff. The evidence shows that just prior to the commence-

ment of the suit, which was commenced March 9th, 1914, Ella Peterson "for a valuable consideration" assigned to plaintiff all her right, title and interest, claim or right of action in and to said contract; and on April 23rd, 1912, said Glenn D. Hart "for a valuable consideration" assigned to plaintiff all his right, title and interest, claim or demand in and to said contract. These assignments amounted either to affirmations of the contracts or attempts to assign and transfer mere litigious rights. In either case the plaintiff should not be permitted to maintain this suit for rescission as to these lots. In this respect the case is on all fours with the case of Cooper v. Hillsboro Garden Tracts, decided by the Supreme Court of the state of Oregon on November 9th, 1915, reported in 152 Pac. 488. In that case one Cooper brought suit for cancellation of ten land contracts signed by the defendant, one only of which was made with the plaintiff, while as to the nine others, he was claiming merely as assignee. The suit was brought for the purpose of rescinding all of the written agreements and recovering the installments paid and the value of certain improvements made by the contracting purchasers. It was alleged that there were fraudulent misrepresentations in making the different sales. The defendant challenged the right of Cooper to maintain a suit for the rescinding of the land agreements which

were assigned to him. The plaintiff prevailed in the lower court but the Supreme Court of the State of Oregon reversed the decision and dismissed the Complaint upon the ground that a mere litigious right cannot be assigned, and upon the further ground that if plaintiff took the position that he did not acquire by the assignments a mere litigious right, but acquired the rights of his assignors in the lands, then the assignments were merely affirmations of the contracts, and the contracts being thus affirmed, neither the original purchasers nor their assignee could maintain a suit for the rescission of the contracts.

In the opinion at page 492 of 152 Pacific Reporter, the court says: "It must be borne in mind, however, that this is a proceeding brought for the purpose of rescinding the transaction in its entirety and placing the parties, as near as the circumstances will permit, in the same positions they occupied before signing the agreement; and the plaintiff must of necessity, accept one of two alternatives: Either, that the assignors parted with all their rights by making an absolute transfer of their entire interests in the contracts and in the lands; or else that the sole purpose of the assignment of the contracts was to enable Cooper to sue. When the assignments were made, not only Cooper, but the

assignors, knew all that was known tothem at the time of the trial; the contracts were transferred with full knowledge of the alleged fraud; and therefore the assignments of all the rights arising out of the contracts were themselves acts which affirmed rather than disaffirmed the agreements. Scott v. Walton, supra. If by affirming the contract the assignor waived his right to object, then Cooper cannot complain of any fraud practiced upon the assignor, because the plaintiff cannot have any greater right than was possessed by his assignor. Cooper cannot repudiate these land contracts if, with a knowledge of all the facts, the assignors affirmed them. If the plaintiff hangs his case upon the other horn of the dilemma----and he does, because he says in his brief that the assignors of plaintiff assigned their interest in the lands for the purpose of bringing action and for the purpose of rescission ---then he is confronted with the rule that a mere naked right to sue for a fraud cannot be transferred alone and by itself. Ryan v. Miller, 236 Mo. 496, 139 S. W. 128, Ann. Cas. 1912D, 540; Gruber v. Baker, supra. The plaintiff has, by his own conduct, waived any right to rescind his individual contract; and he cannot maintain this suit as assignee of the other contracts."

The plaintiff in this suit is in exactly the posi-

tion of the plaintiff in the Oregon case above mentioned. We have already pointed out that as to the lot purchased by the plaintiff, she was at all times represented by her husband in the making of the purchase, and in the subsequent examination of the land, and in all transactions connected therewith, and after he had repeatedly seen the land he accepted it, agreed to substitution of pear trees for peach trees, undertook to look after its future cultivation and care, and in fact authorized a contract with a third party to care for the land at his expense. He had, as already shown, requested time for making payments. Thus as to plaintiff's particular tract the contract was beyond question affirmed, and as to the other two tracts, there was affirmation of the same kind, and, besides the contracts were either affirmed by the assignments, or plaintiff is in court with mere litigious rights which cannot be assigned.

Further, the amount involved in the cause of suit based on plaintiff's own claim is less than two thousand dollars (See Record, page 226,) and therefore upon eliminating the two assigned claims, it follows that the District Court was even without jurisdiction.

The decree of the lower court should be reversed

and the suit dismissed, and this Appellant should be awarded costs and disbursements.

Respectfully submitted,

O. P. COSHOW,

Attorney for Appellant W. C. Harding Land Company.

CERTIFICATE.

I,_____
Attorney for Appellant hereby certify that the foregoing is a true and correct copy of the Appellant's Brief and of the whole thereof in the within entitled cause.

_____
Attorney for Appellant.

ACKNOWLEDGMENT OF SERVICE.

STATE OF OREGON, }
COUNTY OF ..... } ss.

I hereby acknowledge service of Appellant's Brief in the within entitled cause, on me in ..... County Oregon, this ..... day of ..... 1916, by receipt personally of a duly certified copy thereof.

_____
Attorney for Appellee.